Supreme Court, U.S.
FILED

(1) 021387 MAR 17 2003

No. 02-

IN THE

Supreme Court of the United States

ROBERT C. WAITERS, SR. Individually and as Personal Representative of the Estate of Dwayne K. Waiters, Deceased; JUANITA F. WAITERS; and SENEE P. WAITERS, as Parent and Next Friend of Kenneth A. Brown, and Shanta'zia P. Brown, Minors,

Petitioners,

v.

PRINCE GEORGE'S COUNTY, MARYLAND; ROBERT P. HETTENHOUSER, Corporal and COREY JOYNER, Officer,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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56 pp

QUESTIONS PRESENTED

1. Whether the reasonableness inquiry under the Fourth Amendment requires considering events immediately preceding the actual use of deadly force including the officers' own reckless or deliberate conduct during the incident that unreasonably created the need to use force, as to which the courts of appeals are in conflict.

2. Whether the Court of Appeals erred in failing to carefully examine the officers' version of events and whether they were internally inconsistent and contrary to other known facts where there were no other eyewitnesses to the incident.

3. Whether, in upholding summary judgment for defendant officers, the Court of Appeals erred in concluding that the officers reasonably believed they were in danger when Plaintiff's evidence was that Dwayne K. Waiters never posed a threat.

LIST OF PARTIES

The parties to this proceeding before the United States Court of Appeals for the Fourth Circuit were all parties contained in the caption of this Petition for Certiorari; and The Coalition of Concerned Black Christian Men, who filed an Amicus Curiae brief before the Court of Appeals, and were represented by the Lawyers' Committee for Civil Rights Under Law.

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Robert C. Waiters, Sr., Individually and as Personal Representative of the Estate of Dwayne K. Waiters, Deceased; Juanita F. Waiters; and Senee P. Waiters, as Parent and Next Friend of Kenneth A. Brown, and Shanta'zia P. Brown, Minors, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a -3a)[1] is unreported. The district court did not issue a written opinion; its judgment was announced in open court. (App. 6a - 15a.)

STATEMENT OF JURISDICTION

The court of appeals entered its judgment on November 7, 2002. (App. 2a.) The order denying the Petition for Rehearing En Banc was filed December 16, 2002. (App. 4a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fourth Amendment

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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1. Throughout this Petition, "App." is used to refer to the Appendix to the Petition and "JA" refers to the Joint Appendix filed in the Fourth Circuit in this case.

STATEMENT OF THE CASE

This case arises from a call for help that Petitioner Senee Waiters made at the direction of her father, Robert C. Waiters. On the evening of October 9, 1997 the Waiters family needed help because their son and brother, a law-abiding young man who had no prior history of mental illness, violent behavior, or trouble with the police, was acting bizarrely. That evening Dwayne Waiters was running in and out of the house, walking around outside in his underwear, pouring water on himself, and talking strangely about being "saved". With the anguish that a parent who sees their child experiencing a mental illness and losing touch with reality inevitably suffers, Petitioner Robert Waiters determined that he would require assistance to get Dwayne the help he needed. Mr. Waiters explained: "I just needed some help . . . to take him to a hospital or something, you know, somewhere, need some help . . . you know, just when people are acting strange. I mean, somebody got to help him. I didn't know. I couldn't help him." JA 75-76. In Senee's words, "I didn't want to call the police. I was trying to get an ambulance there to get help for him. . . . Because my brother needed help and he wasn't himself." JA 99-100.

Dwayne K. Waiters needed medical treatment but instead he received twelve gunshot wounds from eleven bullets, six of which entered his back and two of which struck his heart, instantly killing him. Less than three minutes after arriving at the Waiters home, Respondents Hettenhouser and Joyner shot and killed Dwayne Waiters in the kitchen of his family's apartment, while Dwayne's father and sister remained where Respondents instructed them to stay, unable to see or to help in any way.

Even without civilian eyewitness testimony, Petitioners offered evidence of facts and circumstances surrounding the shooting demonstrating that the officers were not reasonably in fear of their lives. First, Petitioners' evidence contradicts the officers' testimony about the threat that Dwayne Waiters posed to them. Second, Petitioners' evidence demonstrates that the officers unreasonably put themselves in a situation they perceived as dangerous, in violation of their training, such that there was nothing Dwayne Waiters could do to avoid being a threat in the officers' view. Not only was summary judgment for the defendants improper in this case, the Fourth Circuit, in conflict with the law in other circuits, applied a "split-second analysis" (App. 1a-3a) that effectively negates any possibility of meaningful judicial review. The District Court ruled on summary judgment from the bench without a written opinion. The Fourth Circuit affirmed in a per curiam opinion based on the mistaken view that the only factual dispute in the case was created by discrepancies between the two officers' various statements about the incident.

A. The Shooting

In the first instance, the question of whether the Respondent officers reasonably believed their lives were in danger depends on whether Dwayne Waiters posed a threat to them at the time they shot him. Petitioners' evidence, if believed, demonstrates that Dwayne Waiters' right hand was nowhere near the ordinary silverware table knife that was lying on the counter across the sink from where he was sitting. JA 145, 208, 212, 233-34, 385-86. His fingerprints were not on the knife. JA 233-34. Moreover, although Dwayne was bleeding from a cut to his wrist; bleeding enough that his blood was "all over the place," JA 116, and bleeding enough

that his father had blood on his pants from holding Dwayne down, JA 79, there was no blood on the knife. JA 332. The Officers did not say anything to Dwayne prior to shooting him. JA 71. Dwayne was not facing the officers when six of the eleven shots were fired and was down on the ground when four of the shots struck his body. JA 248, 332, 360-63. He was not able to run because his shorts were down around his ankles. JA 249. Nothing prevented the officers from retreating from the kitchen area to a safer position in the apartment. JA 288. In these circumstances, reasonable officers would not believe that their lives were in danger.

Another element of Petitioners' proof on the reasonableness of the officers' belief that they were in danger is the contradiction between the officers' accounts of the incident. They contradict each other on crucial facts such as whether Dwayne Waiters was merely reaching for the kitchen knife, or actually had his hand on its handle, *compare* JA 309 *with* JA 321; their later statements also contradicted earlier statements on this point. *Compare* JA 321 *with* JA 187. One officer testified that Dwayne Waiters was cut and bleeding on both wrists, the other saw only one wrist bleeding. *Compare* JA 154 *with* JA 322. Most unusual is the fact that the very first statements the officers gave about this incident, for their use of force reports written just hours after the shooting, were identical, word for word. *See* JA 149; *compare* JA 303 *with* JA 305. The significance of these discrepancies and irregularities is not that alone they create a triable issue of fact, but that they are evidence from which a jury could infer that the officers' version of events is less than completely reliable. Such evidence becomes even more significant where, as here, the officers are the only eyewitnesses to the actual shooting.

The second set of relevant and material facts concerns the less than three minutes between the officers' arrival at the apartment and the time that the shooting occurred. JA 321, 392. Petitioners' evidence is that when the officers arrived, Senee Waiters was waiting in the front yard. She did not tell them anything about her brother. As she started to follow them into the apartment, they instructed her to remain outside and she complied. JA 105. Upon entering the apartment, the officers had their guns drawn. JA 71, 244. They observed Robert Waiters holding his son down on the ground, and at this point Dwayne was not struggling. Neither of the men on the floor appeared to be in a life threatening situation. JA 246. The officers ordered Robert Waiters to get up and sit on the couch. Instead of getting more information about the situation, and securing control of Dwayne or of both men, the officers, with guns drawn, ordered that Dwayne be released from his father's control. The father was performing a technique (in this case restraint) that his son required because of a medical emergency, and officers who had been called to assist instead ordered him at gunpoint to stop.

Robert Waiters followed the officers' command. Released from his father's hold, Dwayne got up, went into the kitchen, and began running water. Instead of maintaining a safe distance, getting more information about the situation, seeking protective cover and evaluating if they needed more help, the officers chose to walk into the confined kitchen area which their training explicitly told them is a place where things that can be used as weapons typically are kept. Standing in the kitchen, within six feet of Dwayne, their guns drawn and pointed at him, they failed to maintain a zone of safety between themselves and an emotionally disturbed person. The instruction that these particular officers received

informed them that control distance is a critical aspect of safety, and that they should maintain about twenty-one feet between themselves and a person suspected of having a sharp edged weapon. JA 246-50. They are to use cover and not become trapped without an exiting position. The officers failed to follow the most basic procedures of their training, putting Dwayne Waiters' life in danger by preventing others from assisting him and then using faulty and ineffective measures that did not provide aid to him. The Petitioners' evidence demonstrates that the officers created a dangerous situation by failing to follow their training.

There are other significant inferences from the evidence in the case that must be drawn in the Petitioners' favor as the non-moving party. These include the inference that the officers were unreasonable in their fear of Dwayne Waiters because their very own statements demonstrate that their fear was based on his being non-responsive to their commands, when, at the same time, they recognized that he was apparently a mentally and/or emotionally disturbed person who did not understand what was being said to him. They state that he was dressed in his underpants, sitting on the kitchen counter, pouring water on himself, JA 144, with a strange expression on his face, and "when I [Hettenhouser] was giving him (suspect) [sic] commands, he looked like he was in another world, staring into space." JA 323. Asked "Why did you shoot?", Officer Hettenhouser provides the following written explanation:

> because I was in fear of my life, my partner's life and the life of other parties in the apartment. The suspect went for a knife when told not to also I was within 6 feet of the suspect who was very big (tall solid) and acted like he was crazy.

> The suspect was advised several times first to come out of the kitchen then advised not to go for the knife he refused to obey any of those commands.

JA 324. Dwayne Waiters could not obey the officers' commands any more than he could understand what was happening to him. Just twenty-one years old, in the midst of a psychotic episode for the first time in his life, he was not aware of or able to control his own actions.[2]

Finally, the Petitioners' evidence is that the Respondent officers continued using excessive deadly force after any possible need to do so had passed. Contrary to their training, they shot beyond the point in time at which Dwayne Waiters even arguably posed a threat to them. JA 248. The significance of this fact is not that alone it creates a constitutional violation or that the number of shots fired, without more, can prove the unreasonableness of the officers' actions. Rather, like every other part of the plaintiffs' case, this is one more fact that a jury could consider in determining the reasonableness of the officers' decision to use deadly force against Dwayne Waiters. Evidence that these officers were acting irrationally, firing many more shots than were necessary, shooting Dwayne Waiters in the back six times, failing to assess when they were out of danger and violating their own training, is relevant to whether a reasonable officer in their shoes would have believed that his or her life was in danger. The Respondents in this case had been trained in methods and procedures to use to assist Petitioners in obtaining medical attention for their son and brother.

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2. His condition was completely unrelated to drugs or alcohol, as later pathology tests confirmed no such substances were in his body. JA 411.

The tragedy that resulted from Petitioners' call for help was completely avoidable. In these circumstances, Respondents had the ability and, indeed, the constitutional duty to avoid the use of deadly force; Dwayne Waiters had no ability to prevent it.

B. Proceedings Below

Petitioners originally filed this action in the Circuit Court for Prince George's County, Maryland on October 5, 2000. JA 8. It was removed to federal court by Respondents pursuant to 28 U.S.C. §§ 1441-47, based on the claims in Counts I and II of the Compliant arising under the United States Constitution. JA 11. Following discovery, all Respondents filed a motion for summary judgment, which the Petitioners opposed. A hearing was held before the trial court on February 11, 2002. The District Court briefly heard arguments from counsel and then ruled from the bench, granting the Respondents' motion in its entirety on all claims. App. 6a. The District Court issued a written Final Order the same day, entering judgment for the Defendants without further explanation of its decision. Petitioners had previously sought an order remanding the case to state court, which was denied by the District Court on April 6, 2001. JA 4. A notice of appeal of the final judgment, including the District Court's order on the Petitioners' motion to remand, was timely filed on March 7, 2002. JA 7.

The basis for the District Court's judgment, as announced from the bench, was that the officers were entitled to summary judgment on the merits because, as a matter of law, their actions were objectively reasonable. App. 14a. As an alternative basis, the court states, without any analysis, that the officers reasonably could have been mistaken about

whether their actions amounted to a constitutional violation and thus, even if the force used by the officers was not objectively reasonable, they would enjoy qualified immunity. *Id.*

In analyzing whether the Respondents' use of force was reasonable, the district court initially refused to consider evidence of any events prior to the split-second when the officers fired the fatal shots. Citing *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991), the court reasoned that:

> The Court doesn't look at things before about whether they set up the incident, whether their training was violated or otherwise. The question is, whether they were at the time they were there, were they acting objectively reasonably at that very time? This is all part of the split-second analysis. Again, if you look at that, the issue of training really doesn't factor in here. . . . The real issue here is as of the moment immediately before the firing of the shots, was there objectively reasonable behavior, or beyond that, was there qualified immunity, at least at the federal level?

App. 10a-12a. However, the court goes on to explain the excessive force standard in *Graham v. Connor*, 490 U.S. 386 (1989) as requiring the court to take into account the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers, and whether the suspect is actively resisting or attempting to evade arrest by flight, all of which require an examination of what happened in the moments leading up to the split-second when the officers discharged their firearms. When assessing the reasonableness of the officers' split-second decision to shoot, the court made several findings of fact, including that there was blood, there

was a struggle, and the officers didn't know whether there had been an attempted homicide. The court finds that Dwayne Waiters was actively resisting the officers, "pouring water on his head and acting like he is out of it." App. 12a-13a. Thus, the court concluded that the crime at issue was potentially very serious, that Dwayne Waiters was actively resisting because he ran into the kitchen, that the officers warned him that "he better, whatever, take it easy, not do anything crazy." App. 12a.[3] The court found that Dwayne Waiters appeared to lunge for a knife and that he quite likely was an immediate threat to the safety of the officers. Without further discussion of the evidence, the district court dismissed the Petitioners' state and federal claims.

On appeal, the Fourth Circuit characterized Petitioners' appeal as based solely on the argument that discrepancies between the deposition testimony of the two officers created issues of material fact preventing summary judgment. In its per curiam opinion, the Court of Appeals held that "On the facts of this case, we agree with the district court's conclusion that the officers reasonably believed they were in danger. We also conclude that the officers' continued use of force did not convert an objectively reasonable response into an unreasonable one." App. 3a. The Court of Appeals made no mention of the evidence offered by Petitioners, summarized above, *supra* p. 3-4, demonstrating that the Respondents' decision to use deadly force was not justified under the circumstances because a reasonable officer would not have felt his life was in danger. In addition, the Court of Appeals did not address Petitioners' argument that the Respondents' failure to follow their training on how to protect themselves and the public in these situations was relevant to the reasonableness of the officers' decision to use deadly force.

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3. The officers testified that they did not warn Dwayne Waiters. JA 153.

REASONS FOR GRANTING THE WRIT

This Court's rulings in *Tennessee v. Garner*, 471 U.S. 1 (1985) and *Graham v. Connor*, 490 U.S. 386 (1989), clarified that under the Fourth Amendment's prohibition of unreasonable searches and seizures, the constitutionality of a police officer's use of force depends on the totality of the circumstances as judged by a standard of objective reasonableness. In the years since those decisions, virtually every court of appeals[4] has wrestled with the question of whether and to what extent the police officers' actions leading up to the time at which shots are fired or other deadly force is used are part of the totality of circumstances relevant to a judgment about the reasonableness of the officer's actions. The circuit courts are deeply divided on this question, with six circuits holding that some or all of the events immediately leading up to an officer's use of deadly force are relevant, including the degree to which an officer violates his own training, negligently or recklessly creates a danger, or precipitates the need to use deadly force.[5] Four circuits

4. The D.C. Court of Appeals is the only federal court hearing these types of claims that apparently has not ruled on this issue.

5. These are the 1st, 3rd, 7th, 9th 10th & 11th Circuit Courts of Appeals. *See St. Hilaire v. City of Laconia*, 71 F.3d 20 (1st Cir. 1995), *cert denied*, 518 U.S. 1017 (1996); *Abraham v. Raso*, 183 F.3d 279 (3rd Cir. 1999) (pre-seizure events are relevant because totality of the circumstances inquiry requires examination of full context including all factors bearing on officer's use of force; explicitly rejecting contrary holdings from other circuits); *Deering v. Reich*, 183 F.3d 645 (7th Cir. 1999) (rejecting earlier 7th Circuit precedent to the contrary, finding that officer's pre-seizure conduct is relevant to reasonableness of use of force), *cert. denied*, 528 U.S. 1021; *Billington v. Smith*, 292 F.3d 1177 (9th Cir. 2002) (refining earlier (Cont'd)

exclude any evidence of an officer's pre-seizure activities.[6] Standing somewhere in the middle, the Sixth Circuit has a "segmenting" approach that narrows the time frame under consideration but still requires examination of pre-shooting conduct. *Compare Dickerson v. McClellan*, 101 F.3d 1151, 1161 (6th Cir. 1996) (applying segmenting analysis, officer's failure to knock-and-announce is irrelevant to reasonableness of their subsequent use of force) *with Claybrook v. Birchwell*, 274 F.3d 1098 (6th Cir. 2001) (Court must look at temporal segments but not narrowly confine itself to moment of shooting, reasonableness of initial shoot-out is relevant to assessing reasonableness of later shooting).

(Cont'd)
precedents to hold that if an officer's pre-seizure conduct is objectively unreasonable, he may be liable for his otherwise defensive use of deadly force); *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997) (officers' pre-seizure conduct is relevant), *cert. denied*, 522 U.S. 1148 (1998); *Gilmere v. City of Atlanta*, 774 F.2d 1495, 1501 (11th Cir. 1985) (en banc) (a moment of legitimate fear cannot preclude liability for harm which largely resulted from officer's own improper use of his official power; subject was free at the moment of the shooting and moving towards the officer but the officer unreasonably started the fight), *cert. denied*, 476 U.S. 1115 (1986).

6. These are the 2nd, 4th, 5th, and 8th Circuits. *See Salim v. Proulx*, 93 F.3d 86, 92 (2nd Cir. 1996) (actions leading up to shooting are irrelevant); *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (an officer's actions, even in violation of department policy, are not relevant to reasonableness determination); *but see Rowland v. Perry*, 41 F.3d 167, 173 (4th Cir. 1994) (stating that courts must avoid making artificial divisions in the sequence of events); *Fraire v. Arlington*, 957 F.2d 1268, 1275-76 (5th Cir. 1992) (irrelevant that officer manufactured circumstances giving rise to the need for force), *cert. denied*, 506 U.S. 973; *Schultz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) (pre-seizure evidence of officer's mistakes creating need for force are irrelevant).

This issue repeatedly arises in excessive force claims. As one court has commented, "[t]he time-frame is a crucial aspect of excessive force cases." *Whitlow v. City of Louisville*, 39 Fed. Appx. 297, 2002 U.S. App. LEXIS 13357 (6th Cir. 2002). Most importantly, the different lower court approaches result in different outcomes for plaintiffs in factually similar circumstances. The problem is compounded by the fact that many state courts rely on the federal jurisprudence in their area of the country when interpreting their own constitutional prohibitions on unreasonable seizures. *See, e.g., Gadson v. State*, 341 MD. 1, 8 n.3, 668 A.2d 22, 26 n.3 (1995) ("Article 26 of the Maryland Declaration of Rights is in pari materia with the Fourth Amendment."); Jason M. Whiteman, Note, *Eliminating Pre-Seizure Conduct of a Law Enforcement Officer from Review Under Constitutional and Tort Law*, 61 Md. L. Rev. 1074 (2002) (discussing split in circuits on this issue). This Court should review this case in order to resolve this substantial area of disagreement among the Circuits. Given that all of the circuit courts have already taken varying positions, frequently aware of and acknowledging the conflict among the courts, this is not an area where a consensus view might eventually evolve.

The appellate court's opinion in this case also conflicts with precedent in the Third and Ninth Circuits on the question of whether careful scrutiny must be afforded in cases where the officers who shot the victim are the only eyewitnesses to the incident. *See, e.g., Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994) (a reviewing court must engage in more careful scrutiny of the evidence in the record where the officer defendant is the only surviving eyewitness). Other courts have followed one or the other approach, that of the Fourth Circuit or that of the Ninth Circuit, without explicitly discussing the level of scrutiny involved.

Finally the Court should accept this case for review because it is one of several recent cases where summary judgment motions in excessive force cases have been decided from the bench, without a written opinion and without giving the non-moving party, invariably the Plaintiffs, the benefit of all reasonable inferences in their favor.[7] Likewise receiving short shrift in the appellate courts, Plaintiffs whose family members have been killed at the hands of law enforcement officers find themselves with no meaningful review of the officer's conduct. An appropriate balance must be struck between the constitutional interests at stake, and the officer's entitlement to summary judgment where there are no disputed issues of material fact. The current trend is very far out of balance. This is an important case for any citizen who may encounter a law enforcement officer, but particularly for persons in the midst of an emotional crises or mental impairment, who may not be able to understand or control what is happening to them, and their families, who want to help them.

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7 *See, e.g., Cole v. Mrotek*, No. 02-2102, 2003 U.S. App. LEXIS 4107 (March 10, 2003) (*per curiam*) (denying relief to plaintiffs in civil rights action involving a police officer's alleged use of excessive force without written opinion in the trial court and without discussion of the factual basis or legal analysis justifying affirmance by the court of appeals); *Sigman v. Town of Chapel Hill*, 161 F.3d 782 (4th Cir. 1994) (granting summary judgment to defendants in similar circumstances after failing to assume facts in light most favorable to plaintiffs).

I. The Conflicts Among Circuits On The Fundamental Issue Of What Conduct Should Be Reviewed Have Serious Consequences.

The Petitioners argued to the trial court and on appeal that the reasonableness of the officers' use of deadly force in this case must take into account the fact that they violated their own training with regard to how they should proceed in these circumstances in a number of critical ways. The ultimate and predictable outcome of the officers actions was that they would potentially perceive themselves to be in a dangerous situation. Petitioners' expert explained:

> officers cannot, either through lack of training or by ignoring the training received, place themselves needlessly in jeopardy, and then use the jeopardy they have created to justify the use of deadly force. If you only view one portion of a continually evolving situation as a justification for the use of deadly force, but ignore other actions, not only by the suspect but by the officers, you create a belief that an officer can ignore his training and experience, become carelessly and needlessly involved in a life threatening situation and shoot his way out without fear of being held responsible for his actions.

JA 249. Yet the trial court, following *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991), ruled that it would not consider any facts or circumstances other than those occurring at the precise split-second when the officers fired their weapons. The trial court then went on to credit the officers' testimony that the decedent lunged for a knife thereby becoming an immediate threat to their safety. At the split-

second when the officers fired, the court concluded, a reasonable officer would likewise have concluded that it was necessary to use deadly force in self-defense.

Applying the Tenth Circuit standard to Petitioners' claims results in a completely different outcome. In *Sevier v. City of Lawrence*, 60 F.3d 695 (10th Cir. 1995) for example, plaintiffs in virtually identical circumstances as those faced by the Petitioners' here were allowed to proceed to trial. The *Sevier* plaintiffs called the police to their house because their son was sitting alone in his room with a knife on his lap. He had twice before attempted suicide and they wanted assistance in talking with him because they feared he may again try to hurt himself. When officers responded to the scene, the decedent was in the confined space of his bedroom, while his parents stood down the hallway. *Sevier*, 60 F.3d at 698. Following a confrontation, the officers shot and killed the Seviers' son, Gregory. There is a dispute over whether the officers shot when the decedent was standing with his arms at his side or while he was lunging at the officers with the knife in a raised and striking position. The Plaintiffs claimed that the officers used excessive force when they confronted their son in the hallway, and that the officers acted recklessly and unreasonably in the events surrounding the seizure.

The *Sevier* plaintiffs' claims survived summary judgment because "some evidence showed that Gregory did not lunge at Boardman with a knife, and, thus, that highly material fact is in dispute. The court also may have based its denial of summary judgment on the finding that there was conflicting evidence as to whether the officers precipitated the use of deadly force by their own actions during the course of the encounter immediately prior to the shooting." *Id.*, 60 F.3d at

700-01. Most striking in the appellate court's opinion are the footnotes to these two sentences detailing the plaintiffs' evidence. *See id.*, at 701 n.9 & 10. The evidence in the record in *Sevier* was exactly like Petitioners' evidence here. In both cases the plaintiffs introduced forensics evidence that contradicted the officers' version of events. Similar to the Petitioners' evidence here concerning all the ways in which the Respondent officers violated their own training in handling the incident, JA at 243-50, the plaintiffs in *Sevier* introduced "evidence upon which a jury could conclude that defendants acted recklessly by confronting Gregory in the manner that they did after knowing that he was armed and distraught over problems he was having with his girlfriend, and without gathering more information on the situation." *Id.*, at 701 n.10. Applying the "split-second" analysis in the Fourth circuit results in a completely different outcome for plaintiffs in similar circumstances.

The incongruous results in *Sevier* and in this case are not a fluke. The same discrepancy appears in comparing the analysis of the facts in *Allen v. Muskogee*, 119 F.3d 837 (10th Cir. 1997), *cert. denied* 522 U.S. 1148 (1998), to the Fourth Circuit analysis in this case. The Plaintiffs in *Allen* introduced evidence that the officers actions were "reckless and totally contrary to proper police practices for dealing with armed mentally ill or emotionally upset persons." *Id.*, 119 F.3d at 842. This led the court to find that "a reasonable jury could conclude on the basis of some of the testimony presented that the officers' actions were reckless and precipitated the need to use deadly force." *Id.*, at 841. Finding genuine disputes over material facts, the court upheld the denial of summary judgment for the officers. *Id.* The Fourth Circuit's split-second approach, however, completely bars any examination of the officers' actions in the moments

leading up to their use of deadly force. If Dwayne Waiters had been shot in Oklahoma his family would be able to proceed to trial. If Terry Allen had been shot in Maryland, his family would not have been able to proceed to trial. The legality of an officer's use of force under the Fourth Amendment to the United States Constitution should not depend on the state where the incident occurs.

Applying the Sixth Circuit standard in circumstances similar to this case also resulted in a denial of summary judgment for a defendant officer in *Garvin v. Wheeler*, 304 F.3d 628 (6th Cir. 2002). The *Garvin* court examined all the circumstances leading up to the defendant officer's use of force in shooting and killing the decedent in the course of a burglary investigation. The officer's testimony on pre-seizure evidence, such as which direction the suspect was running, and the lack of fingerprints on the gun that the officer said the suspect was pointing at him were sufficient to raise questions about the credibility of the officer's version of events. *Garvin*, 304 F.3d at 630-31. The court did not focus solely on the split-second when the officer fired his gun. Viewing the facts in the light most favorable to the plaintiffs, the appellate court affirmed the trial court's denial of summary judgment for the officer. If a similar standard were applied to Petitioners' evidence in this case, the officers likewise would not be entitled to summary judgment. *See also*, *Brooks v. Sneed*, No. 93-6259, 1994 U.S. App. LEXIS 34286 (6th Cir. Dec. 5, 1994), *cert. denied*, 1995 U.S. Lexis 3522 (May 22, 1995) (summary judgment denied to officer who shot and killed a suspect he said was wielding a knife where material factual disputes remained as to whether a reasonable officer would have had probable cause to believe the decedent posed a serious threat of personal harm).

The difficulty that this question creates is demonstrated by the varying approaches followed by the courts. While six circuits agree that some events leading up to the shooting are relevant, they differ on how to determine what events should be considered. The Tenth Circuit refined its holding in *Allen v. Muskogee* in a subsequent case, *Medina v. Cram*, 252 F.3d 1124 (10th Cir. 2001), also involving police officers shooting a suicidal man. There the court held that tactical errors in the steps leading up to a shooting alone do not make the officers' use of deadly force unreasonable. Rather, the errors are relevant only if they create the need to use force, are immediately connected to the use of force, and rise to the level of reckless or deliberate conduct. *Medina*, 252 F.3d at 1132.

The Ninth Circuit standard is different. An officer's conduct prior to his use of force is relevant only if the conduct is objectively unreasonable and therefore is provocation sufficient to violate the Fourth Amendment. *Billington v. Smith*, 292 F.3d 1177, 1189 (9th Cir. 2002). In the Ninth Circuit a plaintiff cannot avoid summary judgment by producing evidence demonstrating that an officer's actions leading up to a deadly confrontation were "imprudent, inappropriate or even reckless." *Id.* An officer may negligently get himself into a dangerous situation, negligently provoke a violent response or fail to exercise reasonable care, but it is only when he "intentionally or recklessly provokes a violent response and the provocation is an independent constitutional violation, that provocation may render the officer's otherwise *reasonable* defensive use of force *unreasonable* as a matter of law." *Billington*, 292 F.3d at 1190-91.

The Sixth Circuit has yet another approach, dividing the course of events in a deadly force incident into segments for the purpose of analyzing whether an objective officer in those circumstances reasonably would have believed his life was in danger. *See, e.g., Claybrook v. Birchwell*, 274 F.3d 1098 (6th Cir. 2001). In Sixth Circuit cases, the court first must properly decide how to divide the incident into segments and then determine which segments are relevant to the excessive force analysis. *Claybrook*, 274 F.3d at 1104-05 (discussing segmenting rules in prior cases and explaining why certain segments are relevant while others are not).

The fact that this question is not an easy one is further confirmed by the various opinions on the issue even within a particular circuit. The Seventh Circuit originally followed those circuits that do not allow evidence of conduct prior to the use of deadly force. *See Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992). This approach was later broadened to include examination of all of the facts and circumstances leading up to the shooting. *See Deering v. Reich*, 183 F.3d 645, 652 (7th Cir. 1999) ("all of the events that occurred around the time of the shooting are relevant. . . . [T]he totality of the circumstances is what must be evaluated.") *cert. denied* 528 U.S. 1021.

II. The Fourth Circuit Split-Second Standard Violates *Tennessee v. Garner.*

Without a doubt, the Fourth Circuit rule in these cases is one of the most restrictive. It is also wrong. In repeated opinions, the Fourth Circuit has held that the Fourth Amendment reasonableness inquiry focus can only be "on the very moment when the officer makes the split-second judgment," and that the events before that moment "are not

relevant and are inadmissible." *Greenidge v. Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991). *See also Drewitt v. Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (pre-shooting conduct of off-duty officer not in uniform in failing to show badge and or failing to demand the plaintiff stop "is irrelevant to the issues of whether at the moment of the shooting Officer Pratt had probable cause to believe that Drewitt posed a threat of death or serious bodily harm to him."); *Anderson v. Russell*, 247 F.3d 125 (4th Cir. 2001) (officer's "split-second decision to use deadly force against Anderson was reasonable in light of Russell's well-founded, though mistaken, belief that Anderson was reaching for a handgun.") The trial court in this case followed the split-second rule, and refused to consider evidence that the officers violated their training, or to examine whether they created the dangerous situation. App.10a-11a. The court of appeals did not address Petitioners' arguments to the contrary. App. 2a-3a.

The Fourth Circuit split-second rule is wrong in the first instance because it conflicts with *Tennessee v. Garner*'s requirement that the officer's use of force be evaluated in light of the totality of the circumstances surrounding the incident. *See Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). This is one reason why the Third Circuit declined to follow the rule, explaining that:

> we do not see how these cases can reconcile the Supreme Court's rule requiring examination of the 'totality of the circumstances' with a rigid rule that excludes all context and causes prior to the moment the seizure is finally accomplished. 'Totality' is an encompassing word. It implies that reasonableness should be sensitive to all of the factors bearing on the officer's use of force.

Abraham v. Raso, 183 F.3d 279, 291 (3d Cir. 1999). *See also St. Hilaire v. City of Laconia*, 71 F.3d 20 (1st Cir. 1995) (excluding evidence of an officer's conduct occurring prior to the moment of a shooting violates this Court's precedent), *cert. denied*, 518 U.S. 1017 (1996). In order to understand whether a reasonable officer would have believed his life was in danger, the facts and circumstances leading up to the shooting must be taken into account.

The need to understand the context of events is best illustrated by an extreme but not implausible example. Consider the Fourth Amendment analysis where the police officer is the aggressor in an encounter with a citizen, say holding a gun to a woman's head to force her to steal a car. If the woman responds by lunging for a knife, it can not be said that the officer's shooting of her was objectively reasonable because at the moment he shot, he reasonably believed that he was in danger of death or serious bodily injury. All of the circumstances immediately leading to the shooting are relevant. In fact, it may be relevant to know that three weeks earlier the same officer shot the same woman in the arm when she refused to carry out another of his commands; or that the woman was the officer's wife and he had been physically abusing her for months. There can be no question but that factors other than what appeared at the moment of the shooting are relevant to the analysis of the reasonableness of the force used.

At its most basic, the split-second rule is illogical and impractical. Under this rule, courts are left without any principled way to determine when "pre-seizure" events start and no logical explanation why conduct occurring prior to the moment of seizure should be excluded. Pre-seizure activities by the decedent are always examined to determine

the level of threat faced by the officer. In this case, for example, the trial court found it significant that Dwayne Waiters was observed by the officers to be struggling with his father, and that he was "resisting" the officers instructions. App. 12a. Similarly, any rational standard must recognize that the officer's pre-shooting conduct is relevant to the reasonableness of his action at the moment he shot.

Indeed, the Third Circuit characterized the split-second rule as one which only excludes "evidence that helps the plaintiff show the force was excessive" in an attempt to apply it in a way that makes sense. *See Abraham v. Raso*, 183 F.3d at 291. In assessing this approach, the court concluded that there were practical problems with trying to extract from a complex set of events all and only evidence that hurts the plaintiff's case. *Id.* However, this exercise highlights that in practice, the cases that purport to exclude evidence of all pre-seizure conduct selectively exclude evidence of various parties' conduct immediately prior to the officer's use of deadly force. By selectively excluding evidence in this case about the extent to which the Respondents' pre-seizure conduct violated their training[8] and was itself objectively unreasonable in the less than three minutes that elapsed between the time that they arrived at the residence and the time they shot Dwayne Waiters, the Fourth Circuit applied an unfair and unworkable standard that should be discarded.

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8 Indeed, the court's view that pre-seizure conduct was not relevant was also reflected in the court's failure to grant Petitioners' motion to compel additional discovery on the training provided to Respondents prior to this incident. JA 5.

III. The Fourth Circuit Refusal To Scrutinize The Officer's Testimony In This Case Conflicts With Other Circuit Courts' Practice In Similar Circumstances.

One significant aspect of this case is the fact that the officers who killed Dwayne Waiters were the only eyewitnesses to what Dwayne was doing in the seconds before, during and after the fatal shots were fired. They were the only eyewitnesses because the other members of the household followed the officers' instructions to remain outside the house, JA 103, and on the couch. JA 70. In other words, the officers prevented any family member from observing Dwayne while they were attempting to communicate with him by instructing Dwayne's family to stay away from him.

In a series of cases the Ninth Circuit and the Third Circuit have held that where an officer is the only eyewitness to a shooting, the court must be careful to examine the officer's statements to see if they are internally consistent and to look at any circumstantial evidence that may, if believed, tend to discredit the officer's testimony. *See Abraham v. Raso*, 183 F.3d at 290 (3rd Cir. 1999); *Reynolds v. County of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1996); *Scott v. Henrich*, 39 F.3d 912 (9th Cir. 1994); *Hopkins v. Andaya*, 958 F.2d 881 (9th Cir. 1992), *cert. denied*, 513 U.S. 1148 (1993). The court should not simply accept what may be a self-serving account by the officer in order to "ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story — the person shot dead — is unable to testify." *Scott*, 39 F.3d at 915. This is an appropriate balance to strike between the substantial interests that are at stake in deadly force cases, not only the individual's fundamental interest in his own life but also society's interest in judicial

determination of guilt and punishment; and the need to have law enforcement officers who can use deadly force when necessary to protect themselves or others.

In this case however, the court of appeals applied a completely different standard of review, finding it of no consequence that there were discrepancies in the officers' versions of events. App. 2a-3a. The better view is, particularly on a summary judgment motion, and most particularly where the officers instructed potential eyewitnesses to stay in a position where they could not see what was unfolding, that careful scrutiny of the evidence is warranted.

IV. This Case Raises Significant Constitutional Issues.

This case is determined by the Fourth Circuit's highly restrictive and erroneous view of what evidence should be considered in evaluating the objective reasonableness of a police officer's use of deadly force that conflicts with the standards used elsewhere in the country. In addition, the significance of this case is that it condones a course of conduct that is dangerous to the public. Officers will continue to be called upon to assist with persons who are experiencing a mental illness. Abundant knowledge and training exists demonstrating how to carry out this function effectively. JA 246-49; POLICE EXECUTIVE RESEARCH FORUM, THE POLICE RESPONSE TO PEOPLE WITH MENTAL ILLNESSES, TRAINERS GUIDE AND MODEL POLICY (1997). Officers are trained on how to recognize the characteristics of mental illnesses, and given detailed advice about what techniques are most likely to result in a favorable solution to the situation. For example, the model policy cautions that officers should:

- remain calm and avoid overreacting;
- speak simply and briefly and move slowly;
- understand that a rational discussion may not take place;
- recognize that the person may be overwhelmed by sensations, thoughts, frightening beliefs, sounds ("voices") or the environment;
- be friendly, patient, accepting and encouraging, but remain firm and professional;
- be aware that their uniform, gun, handcuffs and nightstick may frighten the person with mental illness — reassure him or her that no harm is intended;
- recognize and acknowledge that a person's delusional or hallucinatory experience is real to him or her;
- announce actions before initiating them;
- gather information from family or bystanders; and
- if the person is experiencing a psychiatric crisis, ask a representative of a local mental health organization to respond to the scene.

Id., Model Policy at 8.

Equally important, the model policy makes suggestions about actions officers should **avoid**, including:

- moving suddenly, giving rapid orders or shouting;
- forcing discussion;
- direct, continuous eye contact;
- crowding the person or moving into his or her zone of comfort;
- expressing anger, impatience or irritation;
- using inflammatory language, such as "crazy," "psycho," "mental" or "mental subject"

Id. These instructions are similar to the training that Respondents in this case received. JA 247. Yet, Respondents failed to carry out any of the recommended actions and instead, did many of those things they were trained to avoid. Taking the facts of this case in the light most favorable to the Petitioners, it is difficult to understand how Dwayne Waiters could have done anything to prevent these officers from shooting him, given the illness he was suffering. We will never know what was going through his mind at the moment the officers shot him. However, from his actions, it appeared that he did not rationally understand what they were asking of him. In these circumstances, it is dangerous to the public to condone such reckless actions by police officers without at least granting Petitioners a trial on their claims.

CONCLUSION

This Court has not specified the extent to which events leading up to a police shooting, including whether the officers' conduct violated their own training, are relevant to assessing the reasonableness of a police officer's use of deadly force. The division among the circuits on this issue creates substantial inequities. The law has evolved in such a way that today, citizens in some states live under very different federal constitutional standards than citizens in other states. This court should grant the writ to resolve these conflicts on this central issue that will continue to arise in cases alleging that police officers have used excessive force.

Police encounters with mentally ill and emotionally disturbed persons are a part of their daily routine. This is not merely an isolated case where the court of appeals failed to catch a lower court's mistake. If Petitioners' evidence is correct, the disturbing conduct of the officers in this case, violating everything they were trained about how to protect the public when mental illness strikes, must not be summarily condoned. For all of these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DATED AND DECIDED NOVEMBER 7, 2002

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 02-1276

ROBERT C. WAITERS, SR., Individually and as Personal Representative of the Estate of Dwayne K. Waiters, Deceased; JUANITA F. WAITERS; SENEE P. WAITERS, as Parent and Next Friend of Kenneth A. Brown, and Shanta'zia P. Brown, Minors,

Plaintiffs-Appellants,

v.

PRINCE GEORGE'S COUNTY, MARYLAND; ROBERT P. HETTENHOUSER, Corporal; COREY JOYNER, Officer,

Defendants-Appellees.

COALITION OF CONCERNED BLACK CHRISTIAN MEN,

Amicus Curiae.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Peter J. Messite, District Judge. (CA-00-3495-PJM)

Appendix A

Submitted: October 23, 2002

Decided: November 7, 2002

Before LUTTIG, MICHAEL, and TRAXLER, Circuit Judges.

Affirmed by unpublished per curiam opinion.

OPINION

PER CURIAM:

The family of Dwayne K. Waiters ("the Family") appeals the district court's order awarding summary judgment in favor of Defendants Prince George's County and Officers Robert Hettenhouser and Corey Joyner. The Family brought an excessive force claim pursuant to 42 U.S.C. § 1983 (2000), following the shooting death of Dwayne Waiters by Officers Hettenhouser and Joyner. The district court granted summary judgment to the Defendants. On appeal, the Family claims that the award of summary judgment was premature because alleged discrepancies between the deposition testimony of the two officers created issues of material fact that should have foreclosed summary judgment.*

We review de novo a district court's grant of summary judgment. *Higgins v. E.I. DuPont de Nemours & Co.*, 863 F.2d 1162, 1167 (4th Cir. 1988).

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* We are also in receipt of and have reviewed the brief filed by amicus curiae.

Appendix A

In the context of an excessive force claim, not every discrepancy creates a triable issue of fact. *Sigman v. Town of Chapel Hill*, 161 F.3d 782, 787 (4th Cir. 1998) (noting that it will nearly always be the case that witnesses will differ over what occurred). In this matter, Officer Joyner testified that Waiters lunged at the officers while reaching for a table knife. Officer Hettenhouser testified initially that Waiters grabbed the knife, but later clarified his response to indicate that he was unsure whether Waiters actually picked up the knife. The Family contends that this discrepancy should be evaluated by the trier of fact. However, as the district court noted, whether Waiters picked up the knife was not dispositive. Rather, the proper inquiry is whether the officers reasonably and objectively believed that their safety was in danger. S*ee Sigman v. Town of Chapel Hill*, 161 F.3d 782, 786-87 (4th Cir. 1998). On the facts of this case, we agree with the district court's conclusion that the officers reasonably believed they were in danger. We also conclude that the officers' continued use of force did not convert an objectively reasonable response into an unreasonable one. *See Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996) (noting that use of multiple shots is not indication of mindlessness so much as an intention to ensure elimination of a deadly threat).

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

APPENDIX B — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED DECEMBER 16, 2002

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 02-1276
CA-00-3495-PJM

ROBERT C. WAITERS, SR., Individually and as Personal Representative of the Estate of Dwayne K. Waiters, Deceased; JUANITA F. WAITERS; SENEE P. WAITERS, as Parent and Next Friend of Kenneth A. Brown, and Shanta'zia P. Brown, Minors

Plaintiffs - Appellants

v.

PRINCE GEORGE'S COUNTY, MARYLAND; ROBERT P. HETTENHOUSER, Corporal; COREY JOYNER, Officer

Defendants - Appellees

COALITION OF CONCERNED BLACK CHRISTIAN MEN

Amicus Supporting Appellant

On Petition for Rehearing and Rehearing En Banc

Appendix B

The appellants' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied.

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

s/ Patricia S. Connor
/s/ Patricia S. Connor
CLERK

APPENDIX C — EXCERPTS FROM THE FEBRUARY 11, 2002 HEARING; AND FINAL ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND DATED FEBRUARY 11, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

CIVIL NO. PJM-00-3495

ROBERT C. WAITERS, SR., et al.,

PLAINTIFFS

VS.

PRINCE GEORGE'S COUNTY, MARYLAND, et al.,

DEFENDANTS

Greenbelt, Maryland

February 11, 2002

The above-entitled case came on for a motions hearing before the Honorable Peter J. Messitte, United States District Judge

PROCEEDINGS

* * *

Appendix C

[42] * * *

THE COURT: In this case, Robert C. Waiters, for himself and as Personal Representative of the Estate of Dwayne K. Waiters, along with Juanita F. Waiters and Senee P. Waiters, as Parent and Next Friend of Kenneth A. Brown and Shanta'zia Brown, sue Prince George's [43] County, Maryland and Corporal Robert P. Hettenhouser and Officer Corey Joyner. The suit proceeds in six counts.

Robert and Juanita Waiters are the parents of the deceased, Dwayne Waiters. Senee Waiters is the sister of Dwayne Waiters.

Count I is a 1983 claim for excessive and unreasonable force, unreasonable search and seizure, and wrongful death on the part of Robert and Juanita Waiters.

Count II has been bifurcated as a *Monell* claim.

Count III is a Maryland constitutional violation claim, essentially in pari materia with Count I.

Count IV also gets the county bifurcated.

Count V is an intentional infliction of emotional distress count.

Count VI is a battery claim on behalf of Waiters' estate.

The allegations are that on October 10, 1997, Dwayne Waiters was 21 years old, and Defendants Hettenhouser and

Joyner were Prince George's County police officers. I guess the day before was the incident in question.

The two officers were called to 2512 Markham Lane in Landover. They allegedly unlawfully entered the [44] premises, shooting and killing Dwayne Waiters, according to the complaint, that Dwayne Waiters and the other plaintiffs were not violating any laws. The shooting was allegedly unjustified and in violation of the Fourth Amendment rights of the deceased and his successors in his interest and hence, proceeds the various causes of action that were earlier recited.

The facts, however, that are not fully recited in the complaint have been fleshed out in discovery and it does appear that there was a call for unknown trouble that went out to the Prince George's County Police Department on October 10, '97.

I guess that's the date. Is it the 10th or the 9th?

MS. GWINN: It would be the day before.

MR. FORET: It's actually the 9th because it is before midnight.

THE COURT: The 9th of October of '97. The police arrived. They apparently noticed blood on the door of the apartment outside as they arrived. They noticed that the door was a and through the door they saw a struggle going on. It turned out that the father, Robert Waiters, was on top of the son.

Appendix C

The police entered at that point. They entered and at that point apparently the father was, to some [45] extent, in control of his son on the floor. But apparently they disengaged quickly and the son bolted into, or went quickly into the kitchen, where the police went after him.

They contend that they told him that they were warning him. Their testimony says that on deposition. He was in the kitchen, a small kitchen, not far off the entrance.

He appeared to lunge for a knife. At the same time he was lunging for the knife towards the officers, they opened fire, killing him, with multiple shots. That is essentially the factual background.

Now the first contention that is raised by the plaintiffs in sequence is that there was an illegal entry, an unreasonable search, if you will.

The argument that is made by the defendants is that there were exigent circumstances that justified the entry. It is true, as a matter of black letter Fourth Amendment law, that a warrantless search is permitted when probable cause and exigent circumstances exist.

Exigent circumstances have been defined variously. Typically they come up in the context of a hot pursuit or a fleeing suspect, destruction of evidence, but it also comes up in the context of [46] situations where speed is essential. A number cases have come up where there is a threat posed by a suspect to the lives and safety of individuals or the public.

Appendix C

The defendant in this case has invited the Court's attention to cases in that regard. One is *U.S. versus Gwinn* — no relation I assume — from the Fourth Circuit, 219 F.3d 326, a 2000 case from the Fourth Circuit. That case recites at, particularly page 332, citing the Supreme Court case of *Mincey*, M I N CE Y, *Mincey versus Arizona*, 437 U.S. 385, at 393, 394, exigencies of the situation make the need of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment and that the need to protect or preserve life or avoid serious injury may justify a warrantless search of a house.

Here you've got an unknown trouble call. Indeed, it was a call that was initiated, as it turned out, by the father and the sister, I gather. That's what they concede. The police come. They see blood on the door. They open the door. They see a struggle. At that point, that alone, that justifies the entry into the house.

This is clearly an objectively reasonable entry in that case and one need not even proceed to the [47] qualified immunity argument at that point. The police are clearly inside there.

Now the next question I suppose sequentially is whether there is something about their training that the police violated that gave rise arguably to the encounter with young Waiters. Again, looking at the Fourth Circuit law in this case, *Greenidge versus Ruffin*, at 927 F.2d 789, a Fourth Circuit case, the Court there speaks in terms of the examination and weighing of the information on the part of the officers "immediately prior to and at the very moment they fire the fatal shots."

Appendix C

The Court doesn't look at things before about whether they set up the incident, whether their training was violated or otherwise. The question is, where they were at the time they were there, were they acting objectively reasonably at that very time? This is all part of the split-second analysis.

Again, if you look at that, the issue of training really doesn't factor in here.

Moreover, in all candor, the expert suggested issues of fact here that are not particularly persuasive. That they had to have a plan of action. Well, of course, they did, but what difference would it have made?

[48] That it was a small kitchen with a retaining wall, I mean those are the kinds of split-second judgments that simply don't factor in here, do not create any issue of fact.

The real issue here is as of the moment immediately before the firing of the shots, was there objectively reasonable behavior, or beyond that, was there qualified immunity, at least at the federal level? Let's assume there is no qualified immunity on the state cause of action.

One always has to revisit, it never hurts to revisit the basic Fourth Circuit law on excessive force, *Graham versus Connor*, picked up more recently in the Fourth Circuit case of *Sigman versus Chapel Hill*. *Graham* is at 490 U.S. 386, 1989 Supreme Court. *Sigman* is at 161 F.3d 782, a 1998 Fourth Circuit decision.

Appendix C

The standard is one of objective reasonableness. It is what a reasonable officer on the scene would have done, taking into account the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers, whether he is acting and resisting or attempting to evade arrest by flight.

Those are all second-by-second judgments. But again, the point is what is the perspective of a reasonable officer on the scene, not what does 20/20 [49] hindsight suggest. That's the basis on which one visits the facts in this case.

Now again, you have to go back and start with the fact that there is a call of unknown trouble, there is blood, there is a struggle. The officers say they immediately come into the apartment and the man, the young man moves rapidly, bolts, whatever the word is. He doesn't go leisurely. He doesn't show an absence of resistance.

He runs into the kitchen, having just been involved in a struggle and very possibly having then attempted to injure somebody else. Maybe the blood is his or the blood of somebody else. The police don't know that at that point.

They go into the kitchen, and one has to assume in the kitchen there are utensils. Utensils can include knives and other sharp objects or potential weapons.

They claim, even though the law of reasonableness might not even have required, they claim they told him to, they warned him that he better, whatever, take it easy, not do anything crazy.

Appendix C

He is pouring water on his head. He is acting like he is out of it. That is the testimony of the officers.

[50] Then he appears to lunge for the knife, at which point the officers open fire.

Now those are 20 second, split second, 20/20, not 20/20 hindsight decisions, but split-second decisions, where you weigh the severity of the crime at issue.

Here we don't know whether there has been an attempted homicide. We know that someone — unknown trouble, where there is blood on the door and the young man, who apparently is bleeding — apparently they see that when he comes in — bolts from custody. So it could be a potentially very severe crime.

Is he an immediate threat to the safety of the officers? Reasonably so, quite likely.

Is he actively resisting? He runs into the kitchen. I mean all those factors come into play under *Graham versus Connor* when this man does what he does.

It's, of course, very troublesome that a young man, who maybe was not intending to hurt officers, acted the way he did. But it is one of those situations where, objectively speaking, one cannot, cannot deny that the officers acted consistent with the Fourth Amendment.

Appendix C

I would say they are not even mistaken in what they did. But even if they were, the Supreme Court last term in *Saucier versus Katz*, at 121 S.Ct. 2151, a [51] 2001 case, made it very clear that there is a difference between a qualified immunity analysis and the straight excessive force analysis. It is not enough to simply say that the Fourth Amendment establishes the general proposition that use of force is contrary if it's excessive under objective standards of reasonableness. You get into very specific kinds of analyses beyond that.

The mere fact that people say there is a dispute of fact on that general issue doesn't give rise to a trial. So the Court went on to say that even if a court were to hold that the officer violated the Fourth Amendment by conducting a warrantless search, *Anderson* still operates to grant officers immunity for reasonable mistakes as to the legality of their actions.

And so it could well be mistaken what the officers did and if the Court judges it reasonable, qualified immunity defense would kick in at a minimum.

Even if this were not objectively reasonable force used here, and the Court holds as a matter of law that it was, but even if it was not, beyond that there would be the protection of qualified immunity on the federal claim at least.

But as far as the state constitutional claim is [52] concerned, it's objectively reasonable. That's in pari materia with *Graham versus Connor*. The Court finds that the defendants are entitled to summary judgment.

Appendix C

Now with regard to the intentional infliction claim, I mean this is just not the kind of extreme and outrageous behavior that one could find under that cause of action, clearly.

I mean it was intentional. I suppose the parents suffered intensely, but police officers are privileged to use force in reasonable circumstances. It is not the kind of extreme and outrageous behavior that the community would condemn at that level of intensity that the cause of action requires.

So there is no cause of action for intentional infliction to kick in, in addition to which I assume there would be a malice requirement as far as the officers were concerned, and there is no evidence of malice here, personal actions actuated by hate or ill will against this decedent. They didn't know him particularly. They were responding to a call.

The Court finds that the defendants are all entitled to summary judgment in this case and will enter an order to that effect for these reasons.

Thank you, counsel.

(The proceedings concluded.)

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. PJM 00-3495

ROBERT C. WAITERS, SR., et al.,

Plaintiffs

v.

PRINCE GEORGE'S COUNTY, et al.,

Defendants

FINAL ORDER

Upon consideration of Defendants' Motion for Summary Judgment and Plaintiffs' Opposition thereto, it is for the reasons stated on the record this 11th day of February, 2002

ORDERED that Defendants' Motion for Summary Judgment is hereby GRANTED; and it is further

ORDERED that final judgment is hereby ENTERED in favor of Defendants Prince George's County, et al.; and it is further

ORDERED that the Clerk of Court shall CLOSE this case.

Appendix C

s/ Peter J. Messitte
PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

(2)

No. 02-1387

Supreme Court, U.S.
FILED
APR 21 2003
OFFICE OF THE CLERK

In The

Supreme Court of the United States

ROBERT C. WAITERS, SR., et al.,

Petitioners,

v.

PRINCE GEORGE'S COUNTY, MARYLAND, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

The Respondents would object to the Petitioners' statement of the case as provided since it is not "[a] concise statement . . . setting out the facts material to consideration of the questions presented" as required by Rule 14(1)(g) of the rules of this Court but was taken by Petitioners as an additional opportunity to provide argument. To those facts contained in the statement, the Respondents would supplement as follows:

Corporal Robert Hettenhouser and Officer Corey Joyner responded to a call for unknown trouble at the Waiters' residence. JA 128, 173 & 392. They observed blood on the doors of the apartment building and the apartment. JA 116, 132-133 & 178. The officers found two men struggling in the living room of the apartment. JA 70, 134-135 & 179. They identified themselves as police officers and gave orders to stop fighting. One of the men complied with these orders and the other darted into the kitchen. JA 70, 136 & 181.

The officers followed Dwayne Waiters into the kitchen, which is relatively small. The distance between them and the suspect is approximately six feet. JA 143, 182 & 184. Dwayne Waiters ignored the officers as they attempted to quiet the situation and was exhibiting bizarre behavior. JA 144-145 & 308-309. Robert Waiters was unable to hear the officers' commands to his son, Dwayne, because he was shouting at the same time. JA 71. Dwayne Waiters was next to a knife that one of the officers described as "a kitchen knife and six to eight inches long." JA 313. The other officer stated that it was a knife having a "blue handle with a shiney [sic] blade 6 inches." JA 324. The

suspect reached for the knife and lunged toward the officers. JA 144 & 185.

Dr. Adams, Petitioners' forensic pathologist, testified that the wounds which he believed to be the first two wounds inflicted were consistent with the officers' testimony that the decedent "slipped off of the counter and turned towards a knife, and they began to shoot . . . " JA 352, 356. The doctor later testified that his data and analysis indicate that the way the officers said the incident unfolded is the way it happened. JA 357.

Mr. Klotz, Petitioners' use of force expert, agreed that if an officer is within 15 feet of a person with an edged weapon (such as a knife), the suspect is able to stab the officer before the officer can shoot and disable the suspect. JA 270. In addition, Mr. Klotz agreed that an officer who is within six (6) to eight (8) feet of a suspect who appears to be going for a knife and lunging towards him is justified in using deadly force. JA 264.

II. ARGUMENT

A. This Case Does Not Meet The Criteria For Review By This Court

The United States Supreme Court has discretion to grant a writ of certiorari when it concludes that "compelling reasons" exist to warrant review. Rules of the Supreme Court of the United States, Rule 10. The Petitioner essentially contends that this case falls within the reasons enumerated in subsection (a) which states that:

> a United States court of appeals has entered a decision in conflict with the decision of another

> United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power . . .

The rule further notes that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

B. There Is Not A Conflict Between The Circuits On The Scope Of Conduct To Be Reviewed.

This Court held in *Graham v. Connor*, 490 U.S. 386, 109 S.Ct 1865 (1989), "that *all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other 'seizure' of a free citizen should be analyzed under the Fourth Amendment and its 'reasonableness' standard . . . " *Id.* at 395, 109 S.Ct at 1871 (emphasis in original). Under that reasonableness standard, the Court instructed that one must pay

> careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight . . . The "reasonableness" of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the

> 20/20 vision of hindsight . . . The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Id. at 396-97, 109 S.Ct at 1872. The Petitioners assert that there is a conflict between the Circuits on the extent to which pre-confrontation conduct of the officer bears upon the objective reasonableness of his actions.

In *Greenidge v. Ruffin*, 927 F.2d 789 (4th Cir. 1991), the Fourth Circuit stated that " . . . the Fourth Amendment 'objective reasonableness' standard [was considered] by requiring that the officer's 'liability be determined *exclusively* upon an examination and weighing of the information [the officer] possessed *immediately prior to and at the very moment [they] fired the fatal shot*[s].'" *Id.* at 792 (emphasis in original). It explicitly based this holding upon the *Graham* case and noted that in judging reasonableness this Court cautioned against the 20/20 vision of hindsight, "elaborated that 'reasonableness' meant the 'standard of reasonableness *at the moment,*'" and that consideration must be given to the officer because of the necessity that he make split-second judgments. *Id.* at 791-92 (emphasis in original). In that case, the Court sustained the trial court's ruling excluding evidence of the officer's actions immediately prior to the shooting (failing

to obtain proper backup and not utilizing a flashlight) as being irrelevant to the *Graham* standard.[1]

There is a second line of cases, misconstrued by the Petitioners, which conclude an officer's pre-confrontational conduct amounting to an independent constitutional violation or provoking an assault by the subject that results in the use of force is admissible. *See Napier v. Town of Windham*, 187 F.3d 177, 189 (1st Cir. 1999) ("pre-confrontational actions themselves could theoretically serve as the unreasonable conduct on which a §1983 claim is based"); *Billington v. Smith*, 292 F.3d 1177, 1191 (9th Cir. 2002) (" . . . Hennessey's estate has not established that Detective Smith provoked Hennessey's attack, much less committed an independent Fourth Amendment violation that provoked it."). Although decided on substantive due process grounds, the Court in *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985) (*en banc*), *cert. denied*, 476 U.S. 1115, 106 S.Ct 1970 (1986), relied upon the conduct of the officer in provoking the suspect's retaliation. In doing so it stated that "any fear on the officer's part was the fear of retaliation

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[1] Using similar treatment, the following Circuits have declined to second guess the pre-confrontational conduct of an officer and excluded or determined not to consider such evidence: *Salim v. Proulx*, 93 F.3d 86, 92 (2nd Cir. 1996) (failing to carry a radio, obtain backup or retreat because of children present); *Fraire v. City of Arlington*, 957 F.2d 1268, 1275 (5th Cir.), *cert. denied*, 506 U.S. 973, 113 S.Ct 462 (1992) (failure of the officer to display badge and identify himself while in plain clothes); *Carter v. Buscher*, 973 F.2d 1328, 1332 (7th Cir. 1992) (decision to arrest suspect on dark highway instead of elsewhere); *Schulz v. Long*, 44 F.3d 643, 649 (8th Cir. 1995) (the officer created the situation by poor tactical decisions); *Wilson v. Meeks*, 52 F.3d 1547, 1554 (10th Cir. 1995) (failure of officer to provide warning and order suspect to show his hands – one of which contained a weapon).

against his own unjustified physical abuse. We conclude that a moment of legitimate fear should not preclude liability for a harm which largely resulted from his own improper use of his official power." *Id.* at 1501. *Accord Allen v. Muskogee*, 119 F.3d 837, 841 (10th Cir. 1997), *cert. denied*, 522 U.S. 1148, 118 S.Ct 1165 (1998) (where an officer runs screaming to the vehicle of a known mentally impaired suspect). Facing such inquiry, the results are not substantially different than those obtained under the *Greenidge* analysis.[2]

The other cases cited by the Peititioners are factually inapposite to this analysis. In *Abraham v. Raso*, 183 F.3d 279, 293 (3rd Cir. 1999), the Court determined that there was a material dispute as to whether the officer was indeed in danger. The Court in *Deering v. Reich*, 183 F.3d 645, 650 (7th Cir.), *cert. denied*, 528 U.S. 1021, 120 S.Ct 532 (1999), considered "knowledge, facts and circumstances known to the officer at the time he exercised his split-second judgment" and specifically "[w]hat Deputy Reich knew about Deering and the basis for the warrant."

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[2] The following conduct was not constitutionally significant to be considered by these Circuits under the reasonableness analysis: *Napier v. Town of Windham*, 187 F.3d at 188-89 (failure to "call ahead" or contacting the suspect from a position of cover); *St. Hilaire v. City of Laconia*, 71 F.3d 20, 27 (1st Cir. 1995), *cert. denied*, 518 U.S. 1017, 116 S.Ct 2548 (1996) (failure to knock and identify on search warrant); *Brandenburg v. Cureton*, 882 F.2d 211, 214 (6th Cir. 1989) (lack of tactical planning and loading of weapons before serving a warrant); *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994), *cert. denied*, 515 U.S. 1159, 115 S.Ct 2612 (1995) (failure to develop a tactical plan and call for assistance prior to attempting an apprehension); *Billington v. Smith*, 292 F.3d at 1190 (tactical errors such as initiating traffic stop in plain clothes, not waiting for backup, etc.).

The *Greenidge* Court never suggested that the knowledge of the officer be ignored, only the pre-confrontational conduct.

This suggests that the approach to pre-confrontational conduct and its relationship to the reasonableness inquiry between the Circuits is not as divergent as suggested by the Petitioners. There was no suggestion in the *Greenidge* case, nor those analyzed using that approach, that the pre-confrontational conduct amounted to a separate constitutional violation or provoked the suspect's actions should not be considered. These issues were never raised in the specific cases. It is, therefore, hard to project that a conflict exists when the ultimate rulings of these Circuits, i.e. the conclusion not to second guess tactical errors by an officer, are consistent.

C. The Court Did Not Improperly Apply The Facts.

The Petitioners also contend that a second conflict exists between the Circuits concerning the degree of scrutiny that should be accorded police shootings. This contention is derived from the language of *Scott* wherein the Court states that in such cases "[t]he judge must carefully examine all the evidence in the record, such as medical reports, contemporaneous statements by the officer and the available physical evidence, as well as any expert testimony proffered by the plaintiff, to determine whether the officer's story is internally consistent and consistent with other known facts." *Scott v. Henrich*, 39 F.3d at 915. There is nothing in the *Scott* case or elsewhere to suggest that this is a heightened standard of scrutiny but only an instruction to carefully consider all the evidence in

such cases. Apparently it is Petitioners' assertion that the nature and quality of evidence was not properly considered in the instant case.

The argument presented is that the Fourth Circuit made erroneous application of the facts and in doing so "has so far departed from the accepted and usual course of judicial proceedings" that this Court should grant certiorari. The Fourth Circuit decision is not in conflict with either the decision of another United States court of appeals or a decision by a state court of last resort, indeed, the law on the issue of constitutional violations is clear. However, as noted by the Court in *Saucier v. Katz*, 533 U.S. 194, 205-06, 121 S.Ct 2151, 2158 (2001) "*Graham* does not always give a clear answer as to whether a particular application of force will be deemed excessive by the courts. This is the nature of a test which must accommodate limitless factual circumstances." The Petitioner merely disagrees with the Fourth Circuit's application of the facts in this specific case to that test.

In the instant case, two police officers responded to a call for unknown trouble and encountered two doors smeared with blood as they entered the residence. Of the two individuals they found struggling inside, one obeyed their commands and the other retreated into the kitchen. Not knowing who else or what was in the kitchen, they followed Dwayne Waiters to determine his intent and because he was acting violently and failed to obey their commands.

In the close confines of the kitchen, these officers observe this individual acting in a bizarre fashion in close proximity to a knife. When Dwayne Waiters reached for the knife and lunged towards the officers, both Cpl.

Hettenhouser and Officer Joyner determined a threat existed and elected to use deadly force.

Petitioners assert that the officers made a tactical mistake and shouldn't have followed this individual into the kitchen or, because one officer observed Dwayne Waiters touch the knife while the other only testified he reached for it, there is a credibility issue that should require a trial. These types of assertions are precisely the second guessing and hindsight that the Court cautioned against in *Graham*. To second guess the officers' entry into the kitchen would inherently expose them to liability if they had decided not to pursue and this inaction permitted Dwayne Waiters to injure himself or another while in that room. Further, there is no doubt that these officers were only a few feet from an individual who had displayed violent, bizarre behavior, refused to comply with their commands and was now attempting to gain a weapon and move rapidly towards their position. Their reaction was reasonable and consistent with all authorities that discuss the use of deadly force.

III. CONCLUSION

For the reasons set forth above, the Respondents respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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April 21, 2003